

JAMES E. BRIGGS
v.
BUREAU OF LAND MANAGEMENT

IBLA 82-895

Decided August 29, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch, dismissing an appeal from a decision of the Phoenix District Manager, Bureau of Land Management, reducing appellant's active grazing preference over a 3-year period. AZ 020-81-01.

Affirmed.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

No reduction of grazing preference will be set aside on appeal if it appears that it is reasonable and that it represents substantial compliance with the provisions of 43 CFR Part 4100. A determination of carrying capacity will not be set aside in the absence of substantial evidence establishing error in the determination.

2. Grazing Permits and Licenses: Base Property (Land): Ownership or Control

Even if an open range law provides cattle belonging to a grazing permittee or licensee with access to forage on unfenced land owned by others within an allotment, the permittee or licensee does not have ownership or control over that land. Such land cannot be considered base property for the award of grazing preference under 43 CFR 4110.2.

3. Grazing Permits and Licenses: Range Surveys

Although annual forage must be given some consideration in determining range capacity, such forage varies widely from year to year so only the minimum amount that may be expected in any given year can serve as a basis in calculating grazing preference.

APPEARANCES: James E. Briggs, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

James E. Briggs appeals from a decision of Administrative Law Judge Robert W. Mesch, dismissing his appeal from a decision of the Phoenix (Arizona) District Manager, Bureau of Land Management (BLM), reducing appellant's active grazing preference over a 3-year period on public land within the Mud Springs allotment. In his appeal to this Board, Briggs alleges that Judge Mesch's decision is in error on the basis of the arguments and evidence submitted below. The Board finds that, however, Judge Mesch applied the correct standard of review to the District Manager's decision, appropriately summarized the evidence, and correctly responded to appellant's legal arguments.

[1] No reduction of grazing preference will be set aside on appeal if it appears that it is reasonable and represents substantial compliance with the requirements of 43 CFR Part 4100. A determination of range capacity will not be set aside in the absence of substantial evidence establishing error in the determination. It is not enough for the range user to show that grazing capacity could be in error; he must show that it is erroneous. Allen v. Bureau of Land Management, 65 IBLA 196, 200 (1982). The record on appeal shows Judge Mesch properly found that appellant failed to meet this standard.

[2] Appellant raised two principal arguments below. First, he alleged that BLM erred in failing to consider over 13,000 acres of private land as his base property in calculating his grazing preference. Although appellant once owned this land, he conveyed it in 1959 to a development company (Tr. 13). Nevertheless, he contends he controls the land for grazing purposes because it remains unfenced and is therefore available to his cattle under Arizona's open range law. ^{1/} A letter from the vice president of the company to which appellant had conveyed the land recognizes appellant's right to graze cattle there until it is fenced (Exh. A-1). Judge Mesch did not construe the Arizona statute as granting any right to graze but simply as a limitation on the owner's right to recover for damages resulting from the trespass of animals. Even if the statute could be construed as allowing appellant to graze livestock upon this land until it is fenced, it is clear that such permissive use of the land does not constitute ownership or control of base property within the meaning of 43 CFR 4110.2-1. The Board emphatically rejected the notion that a merely permissive grazing right could constitute "control" within the meaning of the regulation in Grabbert v. Schultz, 12 IBLA 255, 260-61, 80 I.D. 531; 533-34 (1973).

Moreover, where the grazier whose grazing privileges on a given tract are merely permissive, so that he is a tenant at will, he may not be said to control the land, because "he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him." Black's Law Dictionary 1635 (4th ed. 1951). * * *

^{1/} Judge Mesch quoted the text of the statute, ARS § 24-502: "An owner or occupant of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence * * *."

With reference to land, the courts have held that, in general, to have "control" of a place is to have the authority to manage, direct, superintend, or regulate. "Control" does not import absolute or even qualified ownership, but means the power or authority to direct, govern, administer, or oversee. The word applied to real property implies possession. See cases collected in 9A Words and Phrases (1960).

The word "control" has no legal or technical meaning, and, where used in a statute, must be given such an interpretation as the legislature intended it to have, to be ascertained from the connection in which it is used, the Act in which it is found, and the legislation of which it forms a part. Gulf Refining Co. v. Fox, 11 F. Supp. 425, 430 (D. W.Va. 1935). Although the word is not used in the statute, it is used in the implementing regulation. * * *

The Taylor Grazing Act * * * [43 U.S.C. § 315 et seq. (1976)], provides in its preamble that among its purposes are to provide for the orderly use of public grazing land and to stabilize the livestock industry. In pursuit of these objectives the Act provides mandatory preference for those applicants who are owners, homesteaders, lessees, or other lawful occupants of contiguous or cornering lands. To hold that this preference extends to occupants who are without tenure * * *, whose privileges can be terminated at any time without notice, would be to frustrate the intent of the law to achieve order and stability. [2/]

2/ In Grabbert v. Schultz, supra, the Board considered the meaning of ownership or control of base property in the context of grazing leases for lands outside of grazing districts issued pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976). Although the instant appeal concerns grazing preference within a grazing district issued pursuant to section 3 of the Act, 43 U.S.C. § 315b, the analysis in Grabbert v. Schultz is nevertheless applicable. Section 15 creates a preference to be given to "owners, homesteaders, lessees or other lawful occupants of contiguous lands." Section 3 provides for preference to "those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them." The differences in the wording of these sections do not support a more lenient construction of the regulation requiring "ownership or control" of base property for section 3 preferences than for section 15 leases. In Garcia v. Andrus, 692 F.2d 89, 93 (9th Cir. 1982), the court declined to apply our ruling in Grabbert with respect to its treatment of tenancies in common in determining control of base property. The court left intact, however, the Board's ruling that permissive use is not sufficient to constitute ownership or control of base property. See 692 F.2d at 93, where the court states: "[W]e conclude that a federal grazing lease holder who loses a leasehold interest in a part of the preference land loses control to the same extent * * *."

Thus, the fact that appellant's cattle may have access to land pursuant to a open range law does not mean that appellant owns or controls that land so that it may be used as base land for grazing preference. Judge Mesch properly held that appellant had no control over these lands since appellant was unable to come forward with evidence giving him a right to graze on that land which was binding upon the present owners of the property.

[3] Appellant's second argument was that BLM failed to consider annual forage in calculating the capacity of the allotment, despite the fact that in certain years annuals may constitute 60 percent of the diet of the animals grazed. Although annual forage must be considered in determining the range capacity where evidence establishes that annual forage may constitute a significant portion of the forage available, see Rachel Ballow, 28 IBLA 264 (1976), one must also recognize that annual forage may vary widely from one year to the next depending on the moisture available for it. Only the minimal amount of annual forage should become the basis for stocking the Federal range, with additional grazing permitted on a short term basis during periods when annual forage production has been particularly abundant. Stocking the Federal range on the basis of total forage, both perennial and annual, may severely overrate the range, so that when the annual vegetation dries up, the perennial plants may be required to carry an abusive grazing load. BLM's range expert testified that annual forage was taken into account, but nothing on the record demonstrates its quantitative effect on BLM's determination of grazing capacity. Nevertheless, we agree with Judge Mesch that appellant failed to meet his burden in establishing error in the BLM decision, especially in view of the inability of appellant's experts to fault BLM's determination (Tr. 100-03).

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Will A. Irwin
Administrative Judge

Douglas E. Henriques
Administrative Judge

